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In the Supreme Court of the United States

OCTOBER TERM, 1997

TRACI ANDERSON AND CYNTHIA IRONS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Tort Claims Act waives sovereign immunity for an award of attorneys' fees and expenses against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 127 F.3d 1190. The order (Pet. App. 9-12) and oral decision (Pet. App. 13-53) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1997. The petition for a writ of certiorari was filed on January 16, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Traci Anderson and Cynthia Irons filed this Federal Tort Claims Act (FTCA) action against the United States alleging that the govern-

ment was liable for negligent supervision of its employees, negligent infliction of emotional distress, intentional or reckless infliction of emotional distress, and sexual harassment and retaliation. See Pet. App. 2-3, 40-45.

The district court concluded that the government was liable for negligent supervision and sexual harassment. Pet. App. 40-45. The court based the government's liability for sexual harassment on a Washington state civil rights statute, Wash. Rev. Code § 49.60.030 (1994). Pet. App. 43-45. Because Section 49.60.030 authorizes awards of attorneys' fees and expenses against private parties, the district court concluded that the United States should likewise be liable for such fees and expenses. *Id.* at 11, 46, 51. The court thus entered judgment awarding damages and attorneys' fees and expenses against the United States. *Id.* at 8. On appeal, the United States challenged only the district court's award of attorneys' fees and expenses.

2. On November 4, 1997, the court of appeals reversed. Pet. App. 1-5. The court adopted the holding of *Joe* v. *United States*, 772 F.2d 1535 (11th Cir. 1985), in which the Eleventh Circuit ruled that the FTCA does not waive the United States' sovereign immunity for attorneys' fees, even when the state statute underlying the government's substantive liability authorizes fees against private parties. Pet. App. 3 (citing *Joe*, 772 F.2d at 1536). As the court of appeals explained, "[t]he FTCA refers to attorneys' fees only once, in a provision that limits the amount an attorney can recover in a contingency fee arrangement to twenty-five percent of the total damage award." *Id.* at 4 (citing 28 U.S.C. 2678). Because the FTCA does not contain an express waiver of sov-

ereign immunity for attorneys' fees and expenses, the court determined that the district court's award of fees and expenses was improper. Pet. App. 3-4.

ARGUMENT

Petitioners argue (Pet. 5-11) that certiorari is warranted because the court of appeals' decision conflicts with decisions of this Court construing the waiver of sovereign immunity in the Federal Torts Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The court of appeals correctly held, however, that the FTCA does not waive the United States' sovereign immunity for attorneys' fees and expenses. The court of appeals' decision is consistent with the precedent of this Court and does not conflict with the decision of any other court of appeals. The petition for a writ of certiorari should therefore be denied.

1. Petitioners err in contending (Pet. 5-7) that 28 U.S.C. 2674, which provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances," waives sovereign immunity for attorneys' fees in this case. As all the courts of appeals that have addressed the issue have concluded, the FTCA does not waive the government's sovereign immunity for attorneys' fees and expenses. See Pet. App. 1-5; *Jackson* v. *United States*, 881 F.2d 707, 712 (9th Cir. 1989); *Bergman* v. *United States*, 844 F.2d 353, 357 (6th Cir. 1988); *Johnson* v. *United States*, 780 F.2d 902, 910 (11th Cir. 1986); *Joe* v. *United States*, 772 F.2d 1535, 1536-1537 (11th Cir. 1985). Section 2674 does not mention attorneys' fees, and it therefore fails to provide the requisite express waiver of sovereign immunity. *Johnson*, 780 F.2d at 910; *Joe*, 772 F.2d

at 1536-1537. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 267-268 & n.42 (1975). Indeed, petitioners themselves acknowledge (Pet. 12) that the court of appeals reached the same conclusion as the Eleventh Circuit, which has twice held that a state statute that provides for attorneys' fees against private parties does not furnish a basis for awarding fees against the United States under the FTCA. *Johnson*, 780 F.2d at 910; *Joe*, 772 F.2d at 1536-1537.

The conclusion of the courts of appeals is consistent with this Court's precedent As this Court has made clear, the United States is not liable for attorneys' fees unless that liability is "expressly provided for by statute." *Alyeska Pipeline Co.*, 421 U.S. at 267-268; see also *Ruckelshaus*, 463 U.S. at 685. Where, as here, the applicable federal statute does not contain an express waiver, an award of attorneys' fees against the United States is not permitted.

2. Petitioners argue (Pet. 6-7), however, that the dictionary definition of "liability" extends to "any type of exposure or obligation, not just exposure or obligation to pay damages." Petitioners reason that, because Section 2674 provides that the United States "shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances," Congress intended to include attorneys' fees within the scope of the waiver. Petitioners' argument misses the point. The relevant question is not whether, in the abstract, the word "liability" might include attorneys' fees, but rather whether Section 2674 clearly and unambiguously waives the government's sovereign immunity specifically for attorneys' fees in FTCA cases.

In fact, Section 2674 does not independently waive the immunity of the United States at all. In interpreting the FTCA, the Court begins with 28 U.S.C. 1346(b), "[t]he principal provision" of the FTCA. *Smith* v. *United States*, 507 U.S. 197, 201 (1993) (internal quotation marks omitted). Section 1346(b)—not Section 2674—"delineates the scope of the United States' waiver of sovereign immunity." *Smith*, 507 U.S. at 201.* In Section 1346(b), Congress waived sovereign immunity for "claims against the United States, for money damages * * * for injury * * * caused by the negligent or wrongful act or omission" of a government employee "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable" under state law. 28 U.S.C. 1346(b). Section 2674 provides that the United States "shall be liable, *respecting the provisions of this title relating to tort claims*." 28 U.S.C. 2674 (emphasis added). By its express incorporation of the other Sections of the FTCA, Section 2674 extends the liability of the

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* Petitioners incorrectly assert that this Court held in *Molzof* v. *United States*, 502 U.S. 301, 306 (1992), that Section 2674 also provides a waiver of immunity. The Court looked to Section 2674 in *Molzof* because that Section contains the *exception* to liability for punitive damages, not because the Section contains the waiver of immunity itself. Although other provisions of the FTCA certainly "modify the waiver" (Pet. 11) in Section 1346(b), they modify the waiver by *limiting* it rather than by *expanding* it, as petitioners seek here. See *Molzof*, 502 U.S. at 306 (construing scope of exception for liability for punitive damages in Section 2674); *Berkovitz* v. *United States*, 486 U.S. 531, 535 (1988) (construing scope of discretionary function exception in 28 U.S.C. 2680); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979) (construing statute of limitations in 28 U.S.C. 2401(b)).

United States *only* as far as provided by other FTCA Sections. The term "liable" in Section 2674 is thus restricted to claims that are within the scope of the waiver of sovereign immunity in Section 1346(b).

As this Court has recognized, under the FTCA, the United States is "not liable for the entire range of conduct classified as tortious under state law." *Library of Congress* v. *Shaw*, 478 U.S. 310, 320 (1986). In *Laird* v. *Nelms*, 406 U.S. 797 (1972), for example, this Court held that the United States cannot be strictly liable for ultrahazardous activities under the FTCA even when a private party would be liable for such activities under state law. *Id.* at 799-803. The Court explained that "[r]egardless of state law characterization, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of misfeasance or nonfeasance * * * on the part of the Government." *Id.* at 799 (internal quotation marks and citation omitted). Section 1346(b) contains that limitation but Section 2674 does not. *Nelms* thus confirms that the term "liability" in Section 2674 is limited by Section 1346(b). In sum, the dictionary definitions of "liability" that petitioners cite are unavailing because they do not reflect the context in which that term is used in the FTCA.

3. Petitioners also argue (Pet. 6) that because Congress excepted only prejudgment interest and punitive damages from the scope of Section 2674, attorneys' fees are therefore included within the FTCA's waiver of sovereign immunity. That argument lacks merit.

First, Congress' failure to exclude attorneys' fees by an exception in Section 2674 does not satisfy the requirement that Congress expressly waive sover-

eign immunity for those fees. *Ruckelshaus*, 463 U.S. at 685; *Joe*, 772 F.2d at 1536-1537. The sole reference to attorneys' fees in the FTCA, Section 2678, does not make the United States liable for a plaintiff's attorneys' fees but rather limits those fees to twenty-five percent of the judgment, to be taken directly from the judgment itself. See *Hull By Hull* v. *United States*, 971 F.2d 1499, 1510 (10th Cir. 1992), cert. denied, 507 U.S. 1030 (1993); *Joe*, 772 F.2d at 1536-1537; 28 U.S.C. 2678.

Second, as explained above, the waiver of sovereign immunity in the FTCA is limited to actions for "money damages." Congress had no need to except attorneys' fees, because those fees are not encompassed in the term "money damages." See *Jackson*, 881 F.2d at 712. As this Court has explained, "[o]rdinarily a statutory right to 'damages' does not include an implicit authorization to award attorney's fees." *Summit Valley Indus., Inc.* v. *Local 112, United Bhd. of Carpenters*, 456 U.S. 717, 722 (1982). See also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 277 (1994) (noting that attorneys' fee determinations are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial" (internal quotation marks and citations omitted)). Contrary to petitioners' argument, "the American Rule presumes that the word 'damages' means damages exclusive of fees." *Summit Valley Indus., Inc.*, 456 U.S. at 722-723. Prejudgment interest and punitive damages, on the other hand, are both considered "money damages," and Congress therefore needed to make clear its intent to exclude them from the scope of Section 1346(b). See *Shaw*, 478 U.S. at 321.

Petitioners nonetheless contend (Pet. 7-8) that this Court has interpreted the waiver of sovereign immunity in the FTCA broadly, and therefore the district court properly awarded attorneys' fees and expenses, because Congress did not expressly except attorneys' fees from that waiver. But the rules of sovereign immunity are not suddenly reversed simply because the courts are interpreting the FTCA. Indeed, this Court has noted that it will take care not to extend the waiver of sovereign immunity in the FTCA "beyond that which Congress intended." *Smith*, 507 U.S. at 203. And this Court's cases are clear that the federal government is immune from attorneys' fees "[e]xcept to the extent that it has waived its immunity." *Ruckelshaus*, 463 U.S. at 685; *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. at 267-268 & n.42.

In support of their argument, petitioners rely (Pet. 7-8) solely on cases that are inapposite. None of the cases cited by petitioners involved a claim for attorneys' fees under the FTCA. Instead, all the cases involved claims for money damages that related to the government's substantive liability. See *Berkovitz* v. *United States*, 486 U.S. 531 (1988); *Kosak* v. *United States*, 465 U.S. 848 (1984); *Block* v. *Neal*, 460 U.S. 289 (1983); *United States* v. *Muniz*, 374 U.S. 150 (1963); *Rayonier* v. *United States*, 352 U.S. 315 (1957); *Dalehite* v. *United States*, 346 U.S. 15 (1953); *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949). Moreover, petitioners cite those cases for the proposition (Pet. 8) that *exceptions* to the FTCA's waiver of sovereign immunity must be express. That principle is not relevant here, because attorneys' fees

are not within the scope of the waiver of sovereign immunity in the first instance.

4. Petitioners' reliance (Pet. 9-10) on the fact that the FTCA, when first enacted, specifically excluded attorneys' fees awards against the United States similarly fails to advance their cause. Waivers of the sovereign immunity of the United States "must be unequivocally expressed in statutory text * * * and will not be implied." *Lane* v. *Pena*, 116 S. Ct. 2092, 2096 (1996) (internal citations omitted). Accordingly, a waiver of sovereign immunity cannot be inferred from what Congress did *not* say in the FTCA.

In any event, contrary to petitioners' contention (Pet. 9), Congress has not "repealed the attorneys fee exception" in the FTCA. As petitioners acknowledge, in 1948 Congress did not eliminate the express prohibition against attorneys' fees in the FTCA; rather, Congress moved that prohibition to 28 U.S.C. 2412(c). See Pet. 9 (citing Pub. L. No. 773, Ch. 161, § 2412(c), 62 Stat. 973). See also *Alyeska Pipeline Co.*, 421 U.S. at 268 n.42 (explaining that the purpose of Section 2412 was to make "specific exceptions [with respect to the United States' liability for fees and costs] unnecessary"). And, although the language of the current Equal Access to Justice Act (EAJA) no longer refers to Section 1346(b), it nonetheless specifically excludes "cases sounding in tort" from its waiver of sovereign immunity for attorneys' fees and expenses. 28 U.S.C. 2412(d)(1)(A).

Moreover, in 1966, when Congress amended Section 2678 to raise the limit on attorneys' fees from twenty to twenty-five percent of the judgment, its purpose was to "'assure competent representation and reasonable compensation' in matters litigated under the FTCA." *Joe*, 772 F.2d at 1537 (quoting S.

Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966)). As the Eleventh Circuit has observed,

> [i]f Congress had intended * * * to encourage attorneys to bring FTCA claims not by increasing the percentage of the judgment available to attorneys but, instead, by providing for an award of attorneys' fees from the United States, Congress could easily have done so.

Joe, 772 F.2d at 1537. Indeed, by explaining that "[t]he actual amount of attorneys' fees within the statutory limits * * * is made a matter for determination between the litigant and his attorney," Congress revealed its intent that attorneys' fees be taken from, not provided in addition to, the plaintiff's damages award. S. Rep. No. 1327, *supra*, at 8; see *Joe*, 772 F.2d at 1537.

In short, when Congress intends to waive sovereign immunity for attorneys' fees, it does so expressly. See, *e.g.*, 28 U.S.C. 2412(d)(1)(A) (EAJA); 42 U.S.C. 2000e-5(k) (Title VII). Because Congress has not done so here, the court of appeals' holding is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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